

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Brief July 29, 2008

STATE OF TENNESSEE v. DEMETRIA J. KEMP

**Direct Appeal from the Criminal Court for Sullivan County
No. S51682 R. Jerry Beck, Judge**

No. E2007-02603-CCA-R3-CD - Filed October 31, 2008

Defendant-Appellant, Demetria J. Kemp, pleaded guilty to false reporting, a Class D felony. The trial court denied Kemp's application for alternative sentencing and sentenced her to two years in the Department of Correction as a Range I, standard offender. Kemp appeals the trial court's denial of full probation or community corrections. Following our review of the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

CAMILLE R. McMULLEN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J. and JERRY L. SMITH J., joined.

Joseph F. Harrison, Blountville, Tennessee, for the appellant, Demetria J. Kemp.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; H. Greely Wells, Jr., District Attorney General; and Janine Myatt, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS AND PROCEDURAL HISTORY

In February of 2006, Kemp was charged by presentment with obstruction of legal process, false reporting, and accessory after the fact. On May 7, 2007, she pleaded guilty to false reporting, a Class D felony, and the State dismissed the remaining charges.

On November 13, 2007, an alternative sentencing hearing was held. At the hearing, Kemp's presentence report was entered into evidence. The presentence report indicated that Kemp had been convicted of several misdemeanors including: failure to appear, assault, public intoxication, drug possession, and drug paraphernalia possession. The trial court observed that the two misdemeanor assault convictions had been reduced from felony assault charges. In five of the previous

convictions, Kemp had been placed on probation. Further, she had been charged with violating her probation twice, one of which was pending at the time of the hearing. According to Kemp, the pending probation violation was based solely on her inability to pay court fines and fees due to her fixed income.

The presentence report also indicated that Kemp had mental health and drug issues. Kemp testified that she had been diagnosed as bi-polar, schizophrenic, and manic-depressive. As a result of her mental illnesses, she has been prescribed several medications which, on occasion, she failed to take. Further, in past suicide attempts, Kemp shot herself, cut herself, tried to hang herself, ate glass, and drank bleach. A competency evaluation confirmed that Kemp had a mental condition at the time of her crime but that she was able to appreciate the wrongfulness of her conduct. Finally, Kemp had been taking methadone for her drug addiction and prescription medication to manage her Crohn's disease.

Although Kemp claimed she had only postponed her appointments, the probation officer noted in the presentence report that Kemp had missed several appointments which were never rescheduled. The probation officer also noted in the report that Kemp had failed to submit requested documents.

At the conclusion of the hearing, the trial court denied alternative sentencing and, as originally ordered, imposed the term of two years in confinement as a Range I, standard offender.

ANALYSIS

Our review of the manner of service of a sentence imposed by a trial court is de novo with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d) (2006). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The defendant, not the State, has the burden of showing the impropriety of the sentence. T.C.A. § 40-35-401(d) (2006), Sentencing Comm'n Cmts.

When reviewing the trial court's determinations regarding alternative sentencing, we must consider (1) the evidence received at the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and circumstances of the criminal conduct involved, (5) statutory mitigating or enhancing factors, (6) statements made by the defendant regarding sentencing, and (7) the potential or lack of potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103, -210 (2006); State v. Grigsby, 957 S.W.2d 541, 544 (Tenn. Crim. App. 1997).

A defendant is eligible for probation if the sentence actually imposed is ten years or less. T.C.A. § 40-35-303(a) (2006). An especially mitigated or standard offender convicted of a Class C, D, or E felony shall be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. T.C.A. § 40-35-102(6)(A) (2006). Despite a defendant's eligibility, she is not automatically entitled to probation as a matter of law. T.C.A. § 40-35-303(b)

(2006), Sentencing Comm’n Cmts. Moreover, the defendant bears the burden of establishing her suitability for probation. T.C.A. § 40-35-303(b) (2006).

In determining whether a defendant should be required to serve a sentence of confinement, the trial court must consider if:

- (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
- (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
- (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

T.C.A. § 40-35-103(1)(A) - (C) (2006); see also Ashby, 823 S.W.2d at 169.

Although the trial court did not explicitly state the factors it considered for confinement, the record shows it properly considered Tennessee Code Annotated section 40-35-103(1)(A) - (C) (2006). The trial judge stated that “Mrs. Kemp presents a special case. She . . . has seven [convictions], five prior probations. . . . She has violent prior crimes such as assault. Some started out high, wound up being pled out in the sessions court for assault. . . . She is not eligible for probation based on her prior record, some of which are violent offenses. And probation – she’s been put on supervision five times.” The trial judge further observed that Kemp, at twenty-nine years old, had been arrested every year from the time she was twenty-one years old.¹ Based on these comments, the trial court considered Kemp’s long history of criminal conduct as well as the five prior probation periods to deny Kemp probation. T.C.A. § 40-35-103(1)(A), (C). Accordingly, the trial court did not err in denying Kemp probation.

Kemp also contends that the trial court did not properly consider community corrections. Under the Community Corrections Act, eligible offenders include:

- 1) Persons who, without this option, would be incarcerated in a correctional institution;
- 2) Persons who are convicted of property-related, or drug-or alcohol-related felony offenses;
- 3) Persons who are convicted of nonviolent felony offenses;
- 4) Persons who are convicted of felony offenses in which the use or possession of a weapon was not involved;

¹ The trial court noted that it did not consider charges that were dismissed in determining alternative sentencing.

- 5) Persons who do not demonstrate a present or past pattern of behavior indicating violence;
- 6) Persons who do not demonstrate a pattern of committing violent offenses; and
- 7) Persons who are sentenced to incarceration or are on escape at the time of consideration.

T.C.A. § 40-36-106(a)(1)(A-F) (2006).

As acknowledged by the trial court, Kemp's previous assault convictions (1) demonstrate a present or past pattern of behavior indicating violence, and (2) demonstrate a pattern of committing violent offenses. Therefore, Kemp is ineligible for community corrections under section (a). However, subsection (c) provides:

Felony offenders not otherwise eligible under subsection (a), and who would be usually considered unfit for probation due to histories of chronic alcohol or drug abuse or mental health problems, but whose special needs are treatable and could be served best in the community rather than in a correctional institution, may be considered eligible for punishment in the community under the provisions of this chapter.

T.C.A. § 40-36-106(c) (2006).

First, in order to be eligible for community corrections sentencing under subsection (c), the offender must be eligible for probation. State v. Boston, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). Second, a determination must be made that the offender is suitable for placement in the program by finding that "(1) the offender has a history of chronic alcohol, drug abuse, or mental health problems, (2) these factors were reasonably related to and contributed to the offender's criminal conduct, (3) the identifiable special need (or needs) are treatable, and (4) the treatment of the special need could be served best in the community rather than in a correctional institution." Id. at 439.

The trial judge considered community corrections along with Kemp's mental, suicidal, and drug special needs. The trial judge stated, "Then that leaves us with the special needs provision. Obviously she has special needs. I don't know if we can handle it in an outpatient out-of-custody situation. I doubt it with her history. . . . We've got residential Community Corrections. But from my experience, they can't handle this problem with any success. . . ." Further, the trial judge noted that there was no special needs facility for women similar to the Deberry Center for men. Since Kemp's special needs could not be addressed through community corrections and given her extensive criminal history, the trial court denied community corrections. The trial court's conclusions are supported by the record and justify confinement. Accordingly, the trial court did not err in denying Kemp community corrections.

CONCLUSION

We conclude that the trial court properly denied alternative sentencing in this case, thereby requiring Kemp to serve two years in confinement as a Range I, standard offender. Accordingly, the judgment of the trial court is affirmed.

CAMILLE R. MCMULLEN, Judge